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CHARLES ELMORE

Supreme Court of the United States

No. 423—October Term, 1929.

RUFFIN COLLIE, CLINTON COOK, AND ROBBIE ROWE,
PETITIONERS,

vs.

THOMAS D. FERGUSSON, F. W. DARLING, AND J. S. DARLING,
TRADING AS J. S. DARLING & SON, ET AL.

PETITION FOR REHEARING.

Come now the above named petitioners and present this their petition for a rehearing of the above entitled cause, and in support thereof respectively show:

Concerning the Lien for Waiting Time.

The rule seems to be well settled that the re-enactment in the same or substantially the same terms, of a statute which has received a judicial construction, amounts to a legislative adoption of such construction.

See Chief Justice White's discussion of this rule in *Heald v. District of Columbia*, 254 U. S. 20, also in 65 L. ed. 106, and the annotation appended thereto; *Hecht v. Malley*, 265 U. S. 144; *Gulf, C. & S. F. R. Co. v. Moser*, 275 U. S. 133. Cf. Pet. Opening Brief, pp. 13-26, where the judicial history of R. S. 4527 and R. S. 4529 is related.

This Honorable Court recognizes herein that:

"The claim for double wages which, when valid, is by the terms of the statute 'recoverable as wages,' has been held to be embraced in the

seaman's lien for wages, with priority over other liens, and governed by the procedure applicable to suits for the recovery of seamen's wages." Cf. prevailing authorities cited by this Court under language quoted. Also Pet. Reply Brief, pp. 4-10.

Yet, despite *Gerber v. Spencer* (CCA 9) 278 Fed. 886; *Covert v. British Brig Wexford,* (Choate, J.), 3 Fed. 577, 578-579; *Cox v. Lykes Brothers,* 237 N. Y. 376; *The Astoria,* (CCA 9) 281 Fed. 618; *The El Estro,* (CCA 5) 25 F. (2d) 349; *Burns v. Davis,* (CCA 1) 271 Fed. 439, and apparently overruling and in disregard of the principles laid down in *The Steel Trader,* 275 U. S. 388, (a suit *in rem* construing, like *The Astoria,* supra, R. S. 4527, which does not differ in essentials from R. S. 4529); *Sheppard v. Taylor,* 5 Peters 710, (allowing seamen from one to four and one-half years wages as damages, out of a fund laboriously recovered at great expense, by the deceased *insolvent* owners' bona fide assignees, for a confiscated vessel); *The Resolute,* 168 U. S. 437, at p. 440, (construing U. S. Code, Title 46, Section 600); *Wilder v. Inter-Island Steam Nav. Co.,* 211 U. S. 239, 246-7, 248, (interpreting U. S. Code, Title 46, Section 601), as well as those enunciated by the British House of Lords in *Palace Shipping Co. v. Caine,* (1907) A. C. 368, (construing the parent section of the Merchant Shipping Act on which R. S. 4529 is modeled), the Court now holds:

> "That the liability is not imposed regardless of the fault of the master or owner, or his retention of any interest in the vessel from which payment could be made. It can afford no such protection and exert no effective coercive force where delay in payment, as here, is due to the insolvency of the owner and the arrest of the vessel, subject to accrued claims beyond its value. Together

these obstacles to payment of wages must be taken to be a sufficient cause to relieve from the statutory liability."

This Court having at the same time declared that the language in Section 4529:

> "is designed to prevent by its coercive effect, arbitrary refusals to pay wages and to induce prompt payment when payment is possible"

petitioners submit that the situations found to exist in this case emphatically call for the allowance of waiting time, their wages being *still* tied up (R. 64).

Cf. R. 62, 2nd par., 1st line, from which, between the words "that" and "the"—as shown on Final Decree certified up as *original* document (R. 69, 72, 78)—the following language was *interlineated* by the trial court as *not* being a fact:

> "Respondent Fergusson * * * did not pay his seamen their respective wages because of the financial difficulties he found himself in, and that, therefore, etc." Also see Respondent's Draft, (R. 56).

Here the lienors themselves, two of whom bought in the "Dola Lawson," (R. 21-22), sought to absorb the entire proceeds of the sale, arbitrarily causing Cook and Collie to be denied payment of their wages out of the proceeds deposited on *June 20, 1928* (R. 58-59), though said wages had been previously adjudged to be due them on *June 8, 1928,* and *June 12, 1928,* respectively. On *September 4, 1928,* the formal decree distributing the wages admittedly due is likewise found to have been suspended at the instance of respondents, (R. 74). Nevertheless they are held, under such circumstances, to be:

> "neither within the letter nor the spirit of the statute,"

though obviously on *June 20, 1928,* there was no "obstacle to the payment of wages," nor any "reasonable degree" of *moral justification* for the refusal to pay thereafter. Cf. *Gerber v. Spencer, Cox v. Lykes,* supra.

Whether the reason actuating respondents was their desire to coerce petitioners into abandoning the appeal, or to secure to said adverse claimants their appellate costs out of the fund in the Registry, the result is the same. Manifestly, under U. S. Code: Title 28, Section 837, and Title 46, Section 601, petitioners were entitled to *forthwith* receive their wages and to pursue *their* appeal without prepayment or security for costs, (R. 3, 65, 72). Accordingly, if this Court's present decision remains unaltered, the net result to these seamen will be that despite the splendid principles enunciated herein:

> "A new hardship is added to a vocation already subject to its full share of the ills of life." *Wilder v. Inter-Island Steam Navigation Co.,* supra. Cf. *The Resolute,* supra; Rec. pp. 76-77; Pet. Op. Brief, pp. 2, 11-26; Pet. Reply Brief, pp. 5-10, their checks, drawn 3 months *after* the decision (R. 64, 74) of the Court of Appeals, *necessarily* remaining uncashed pending this Court's determination of their rights.

Under the Ship Mortgage Act, as interpreted in *The Northern Star,* 271 U. S. 562, a lien for the full value of a vessel can be placed against her without the seamen on board having any intimation thereof. Seamen in the nature of things cannot be expected to keep abreast of such transactions any more than they could have acquired, as a practical matter, previous knowledge of the long outstanding (R. 59-62), repair and supply claims of the present respondents. This brings us back to the fundamental proposition that if a seaman has a lien for

the waiting time provided by Section 4529, in order to be of any earthly benefit to him it must be:

> "held to be embraced in the seamen's lien for wages with priority over other liens, etc." Cf. *The Steel Trader* and other prevailing decisions, supra.

Having found that the amounts awarded to petitioners as wages have been unwarrantably retained due to the action of the respondents, whose claims in the main accrued *long* prior to petitioners' employment (R. 59-62), even if there were no applicable statute, this Court should, like the House of Lords in *Palace Shipping Co. v Caine*, supra, extend to these still *unpaid* seamen:

> "the ancient power of the Admiralty Court to shelter them from wrong . . . ."

Surely this is not accomplished in denying both waiting time and interest, and by merely increasing, from one-half to two-thirds, the costs allowed by the Court of Appeals,—where the matter was heard on typewritten transcripts (R. 72)—a difference of but sixteen and two-thirds per cent, or approximately $31.00 of the $189.70 costs taxed *prior* to the allowance of certiorari. Cf. Pet. for Certi., p. 2; R. 74-77. This latter sum does *not* include $155.00 for certifying and printing the record filed here, nor the other necessary costs incurred in submitting the matter to this Honorable Court, all of which ought to be allowed in this Court's mandate when it goes down. Cf. *Fairmont Creamery Co. v. Minn.*, 275 U. S. 70, and *St. L. & S. F. R. Co., v. Spiller*, 275 U. S. 156; Rule 30, sub-div. 2 & 4, and Rule 32, sub-div. 3, Sup. Ct. U. S.; *Benedict's Admiralty* (5th Ed.) Sec. 561.

Concerning the Owner's Waiting Time Liability.

Whatever might be thought of the validity of their liens under this remedial Act, there is surely no logical reason why the petitioners are not entitled to a decree against Fergusson, the drunken (R. 38, 39) master and owner, for the waiting time due them. To deny them these statutory wages, certainly as against such defaulting employers, would amount to nothing less than a frustration of the remedy repeatedly sought to be given the seamen by Congress since the formulation of the very first Judiciary Act.

> Cf. authorities cited in this Court's opinion (which does not refer to any of its previous decisions on analogous matters), with *The Steel Trader, Sheppard v. Taylor, The Resolute, Wilder v. Inter-Island, Palace v. Caine,* supra,—none of which are mentioned therein.

In the instant case, Fergusson was liable under the express terms of Section 4529, being both the master and the owner. Under the Court's present determination he is permitted to escape all liability for waiting time on the assumption that he is insolvent, and that this exception must be read into the statute. While it is perhaps true that it might be difficult to collect anything from Fergusson, his own testimony makes it clear (R. 38), that he has never made any defense on the ground of insolvency or otherwise. Indeed the decree below, as modified by this Court, will still provide for alternative judgments against Fergusson for petitioners' wages, plus interest, and also *in personam* judgments over in favor of the repair and supply lien claimants (R. 59-61), as well as a personal judgment against him in favor of Respondent Council, whose lien claim was stale (R. 62).

Fergusson very frankly admitted that:

> 'The claims asserted by Ruffin Collie and Clinton Cook in their intervening libel are correct." (R 37, 38. 44-45).

Even if it were shown that Fergusson was insolvent, it is submitted that there is nothing in the statute or the authorities which in any way indicates that by squandering the earnings of the vessel in satisfying his thirst for drink (R. 38, 39) he could exempt himself from a judgment for the statutory liabilities imposed by the Act. R. 36; Cf. R. 76-77; Language interlineated on *original* of Final Decree, quoted supra, p. 3.

Conclusion

For the foregoing reasons it is respectfully urged that this petition for rehearing should be granted, and, upon further consideration of the case, that the decree herein be further modified in the particulars mentioned; that an order be forthwith entered withholding the mandate herein until the further direction of the Court; and that the petitioners may have such other and further relief as in law and justice they may be entitled to receive.

JACOB L. MOREWITZ,
Proctor for Petitioners.

PERCY CARMEL,
Of Counsel.

I, Jacob L. Morewitz, Proctor for the above named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

JACOB L. MOREWITZ.